

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1920 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BHUPAL DEV LALJI RAM

Versus

RAMESHCHANDRA DEVIPRASAD

Appearance:

MR JITENDRA M PATEL for Petitioners
MR TRILOK J PATEL for Respondent No. 1
MR BK DAMANI for Respondent No. 7
Mr. C.C.Bhalja, ASSTT. GOVERNMENT PLEADER for
the Respondent No. 11

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 03/08/98

ORAL JUDGEMENT

By means of this petition, the petitioners have sought for quashing the judgment and order dated 6.11.87 of the City Deputy Collector passed in case no.1 of 1985 (Annexure "H") and the judgment and

order dated 20.2.92 of the Gujarat Revenue Tribunal in Revision Application no. Ten/B/A/50/88.

2. Bhupal Dev Lalji Ram and Deviprasad Chhotalal purchased the land by a registered sale deed dated 5.12.66 after having been issued required certificate dated 1.12.66 by the Collector under Rule 36 of The Bombay Tenancy and Agricultural Lands Rules (hereinafter referred to as the Rules). One of the share holders, namely Deviprasad has expired and entries have been mutated in favour of his four sons, one daughter and widow in the revenue record by entry no. 3208 and that was certified on 4.6.78. Lateron, the co-parcener and his five sons Karansing Lalji Ram, Chhotalal Lalji Ram, Hajari Lal Lalji Ram, Radhelal Lalji Ram and Pursottam Lalji Ram, who are petitioners before this Court were also recorded vide entry no.3362, notices were issued on 11.4.80. After holding an inquiry, the ALT and Mamlatdar, certified entry no. 3362 by his order dated 11.4.80. The City Deputy Collector issued show cause notice dated 26.8.86 for violation of conditions imposed in other rights of form no.7/12. The City Deputy Collector by his order dated 6.11.87 held that names of five brothers and Bhupal Dev Lalji Ram and names of daughters and wife of Shyamlal Chhotalal were entered by mutation entry no. 3362. In view of entry no.2384 and the second right in form no. 7/12, the said land without permission of the Collector cannot be gifted, mortgaged, sold or transferred and the same is required to be cultivated personally. In spite of having such type of rule, other names have been entered and the distribution is not according to the provisions of Urban Land (Ceiling and Regulation) Act. Thus, by entering the names of the petitioners without permission of the Collector breach of condition was committed. The land bearing survey no. 432 and survey no.437 was confiscated to the Government.

3. Being aggrieved by the said order of the City Deputy Collector, the petitioners preferred a Revision Application aforesaid before the Gujarat Revenue Tribunal contending that the condition has been imposed by the Collector, that the applicants shall not transfer the said survey nos. to anybody else without previous permission of the Collector and the names of the petitioners were entered without obtaining any permission under Section 63(1) of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Act) read with rule 36 of the said Rules. It was incumbent upon the applicants to obtain permission under Rule 36(2) before applying for mutation entries in the names of the opponents which they had not done. Hence,

the inquiry held by the Deputy Collector under the provisions of the Act read with Rules is not legal and proper. It was also held that the Deputy Collector rightly cancelled the permission and has confiscated survey nos. to the State Government. It is not necessary that after cancelling the permission the Deputy Collector has to send the papers to the Mamlatdar and ALT for holding an inquiry under Section 84-C of the Act. The inquiry is complete as soon as Deputy Collector came to the conclusion that the applicants have committed breach of the terms imposed upon them by the Collector in 1966. Thus, the order passed by the Deputy Collector was affirmed by the Tribunal by its order dated 20.2.92.

4. The learned counsel for the petitioners raised three main contentions.

- (1) The sale in question is not a transfer in the eye of law. Therefore, there is no breach of condition.
- (2) The Deputy Collector has no power to initiate proceedings after a period of 6-8 years which is not a reasonable time for exercising suo motu jurisdiction.
- (3) Even in Rule 36, the Collector has no power to initiate the proceedings in this respect.

5. It is undisputed that two persons namely Bhupaldev Laljiram and Deviprasad Chhotalal jointly purchased the land after obtaining the Collector's certificate. Deviprasad died and names of his heirs and legal representatives were also mutated in place of Deviprasad. Second entry no.3362 dated 11.4.80 was made in the names of Rameshchandra Deviprasad and others with his five brothers Karansing Lalji Ram, Chhotalal Lalji Ram, Hararilal Lalji Ram, Radhelal Lalji Ram and Parsottam Lalji Ram as co-parceners in the same land. The entry was made in the present case, admittedly in their favour and other co-parceners and his five brothers.

6. The contention of the learned counsel for the petitioner in this respect is that it is the property of co-parceners of the joint family. It may be enlarged by adding some members or extinguishing rights in favour of the remaining members, it will not amount to transfer and the petitioners are not strangers and they are only co-parceners of the family. Section 2(7-A) of the Act says that the joint family means an undivided Hindu family, and in the case of other persons, a group unit, the members of which are by customs joint in estate

or residence. The petitioners are members of the same family and their names were mutated which does not amount to any transfer. He also relied on a judgment in the case of Ishverbhau Bhagubhai vs. Special Secretary, Revenue Department and others reported in 1984(2) Gujarat Law Reporter, 1219 wherein this Court has held as follows:

"It is a well settled that relinquishment of an interest in an immovable property by a co-parcener has the effect of only an effacement or extinction of the interest of the releasor in the property. As a result of relinquishment of his share by a co-owner, number of members who remain entitled to participate in the estate gets reduced. It does not lead to any transfer of right, title or interest in the property. This is not a case where a person who had no right or interest in the property was given such a right by the release deed. The Mamlatdar had not cancelled the mutation entry made in the revenue record on the ground that it was not a genuine release deed. In view of the facts and circumstances of this case, it must be held that the authorities below committed an error in taking the view that the relinquishment of shares by the remaining co-owners amounted to a transfer prohibited by section 43(1) of the Tenancy Act. This basic error of law on the part of the authorities below has vitiated the orders passed by them; and has resulted into miscarriage of justice."

6. Thus the learned counsel for the petitioner contended that it is a land which is in the co-parcenership of the petitioners and the heirs of Deviprasad. The land has not been transferred to any other person. Hence, there is no question of violation of any statutory provisions of the Act. The learned AGP Mr. Bhalja on the other hand contended that a show cause notice was issued to the petitioners. The lands bearing survey nos. 432 and 457 were running in the names of the petitioners as occupants. Originally, these survey nos. were purchased by Deviprasad Chhotalal and Bhupal Dev Lalji Ram. Permission granted conditionally that cultivation shall be made personally and without prior permission of the Collector and no gift, sale or transfer shall be effected. This condition was also noted in the village form no. 7/12 in the right side. Instead of that, without taking permission from the Collector for the said survey no., entry no. 3362 was made and entered

the name of Shyam Lal Chhotelal together with two sons and his wife as co-parcener and entry no. 3362 was also made and entered the name of Ramanlal Shyamlal, Karansing Lalji Ram, Chhotelal Lalji Ram, Hajari Lal Lalji Ram, Radhelal Lalji Ram, Parsottam Lalji Ram Lalji, Dineshkumar Shyamlal and Gayatridevi, wife of Shyamlal as co-parceners. It was violative of the terms mentioned in "other rights" of form no.7/12. The learned AGP further pointed out from explanation no. 2 of Sub-section 5 of Section 2 that in the case of a joint family, lands shall be deemed to have been cultivated personally if it is cultivated by any member of such family and in the case of family other than joint family, a person other than the husband or as the case may be, wife of the person concerned, or any of his lineal descendants dependent on him. He further submitted on the basis of this explanation that the petitioner nos. 2 to 6 cannot be said to be members of the family of Deviprasad who has died. As such, their names appear in the record of rights in violation of Section 63 and Rule 36 thereunder, whereby a restraint has been imposed on sale, gift, exchange, lease or create any interest therein, mortgage, even agreement to sell unless the Collector or an officer authorised by the State Government in this behalf grants permissions for such sale, gift, exchange, lease, mortgage or for such agreement on such conditions as may be prescribed. Sub-rule (3) of Rule 36 provides that where permission is granted on the conditions specified in clause (f) of sub-rule (1), such permission shall be subject to a further condition that as soon as a person in whose favour the sale, gift, exchange, lease or mortgage as the case may be, on land is made, ceases to cultivate the land personally or transfers his interest in the land by sale, gift, exchange, lease or mortgage without previous sanction of the Collector, permission given under Sub-section (1) of Section 63 shall be deemed to have been cancelled.

7. The question in the present case, is very simple that the petitioner no.1 is a co-parcener of the sale deed, while the petitioner nos. 2 to 6 are brothers of the petitioner no.1 and their names have been entered with the names of the heirs of other co-parcener Deviprasad. Then will it amount to transfer in favour of the petitioner by the heirs of Deviprasad and will it amount to violation of statutory provisions of law ? As in the present case, the property has not yet been partitioned in any manner whatsoever, other co-parceners have shares over the property in dispute. It cannot be said that other parceners of the petitioner no.1 have no share in the property and the petitioner nos.2 to 6 being

brothers of the petitioner no.1, have no right at all, to cultivate the same. At the most, it can be said that the heirs of the co-parcener Deviprasad have allowed the names of the petitioners in their holdings by relinquishing or reducing their shares, in no way, it could be said that they have transferred the land to the petitioners in violation of conditions specified above. I fully agree with the observations of the Hon'ble Mr. Justice G.T.Nanavati, J (as he was then) in the case cited above relied upon by the learned counsel for the petitioner that if any two sharers relinquish their share in favour of co-parceners, it will not amount to sale, gift, or exchange.

8. In the facts and circumstances of the case, the petitioners have succeeded in proving their case on the first ground alone and I do not think it necessary to deal with other two grounds. I therefore, hold that the lower authorities have committed an error of law in holding that the entries of the heirs of Deviprasad with the names of the petitioners is illegal and is violative of Section 63 of the Act read with rule 36 of the Rules.

9. In view of the above discussion, this petition is allowed and the order of the City Deputy Collector dated 6.11.87 passed in case no. 1 of 1985 at Annexure "H" and the order of the Gujarat Revenue Tribunal dated 20.2.92 passed in Revision Application No.TEN.B.A. 50/88 at Annexure "I" are hereby quashed and set aside. The Rule is made absolute accordingly with no order as to costs.

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